MEMORIAL OF THE MONONGAHELA NAVIGATION COMPANY.

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Monongahela Navigation Company, Pittsburgh

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MEMORIAL

OF THE

Monongahela Navigation Co.

PROTEST AGAINST THE DISMEMBERMENT OF COMPANY'S WORKS, AS ATTEMPTED IN RIVER AND HARBOR BILL H. R. No. 1495, AND THE EXCLUSION OF THE FRANCHISES IN ASCERTAINING THE VALUE OF THE PROPERTY.

To the Honorable the Senate and House of Representatives of the Congress of the United States:

The Committee on Rivers and Harbors, to which had been referred H. R. 5,681, being a "Bill to provide for the purchase or condemnation of the *entire property* and appurtenances of the Monongahela Navigation Company, a corporation of Pennsylvania," has reported the same with *amendments*, and included the amended bill in the River and Harbor Bill No. 1,495, pages 26, 27 and 28. The amendments in substance are:

1st. The purchase or condemnation provided for is *limited* to lock and dam No. 7, otherwise known as the "upper lock and dam," and its appurtenances; and the maximum sum which the Secretary of War may pay for this part of the property is fixed at $161,733.13.

2d. That the franchises of the corporation are to be *disregarded* in ascertaining the value of the property under and by the authorized proceedings in the Circuit Court of the United States; the amendment being as follows:

"*Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated" (page 27, lines 641, 642, 643 of the reported bill).

First. The lock and dam No. 7 was constructed in 1884, and immediately opened for purposes of navigation; this dam is now in excellent condition. The cost of building it, including necessary ground, dwelling house and appurtenances, was something over $167,000. The actual cost of the lock and dam alone was, as is stated in the amended bill, reported by the Committee. The wants of the navigation of the river and the interests of the Navigation Company did not call for the construction of this dam when it was built, nor was the Navigation Company under any obligation to construct it at that time. Act of the Legislature of Pennsylvania, approved April 8, 1857 (Report of Engineers, Appendix 8, page 56), provided "that whenever the construction of sufficient locks and dams to extend the slackwater on the Monongahela river from the Pennsylvania State line to Morgantown, in Monongalia county, Virginia, shall have been commenced, it shall be the duty of the Monongahela Navigation Company to commence the construction of lock and dam No. 7, in such manner and on such plan as will extend the navigation from its present terminus to the Virginia State line, and complete the same simultaneously with the completion of the work extending to Morgantown." And so much of all acts theretofore passed as had reference to the time of completion of said improvement to the Virginia State line were thereby expressly repealed.

This act contemplated an extension of the works beyond the State line by the State of Virginia, but nothing was ever done by that State in that direction.

In the River and Harbor Bill, passed by Congress on the 3d of March, 1881, (21st Statutes at Large, 471,) is the following: "Improving Monongahela river, West Virginia "and Pennsylvania, $25,000; but this sum shall not be

"expended until the Monongahela Navigation Company "shall have undertaken in good faith the building of lock "and dam No. 7 at Jacob's creek, and until said company "shall, in manner satisfactory to the Secretary of War, "give assurance of their ability and purpose to complete "the same."

On the application of William E. Merrill, Major of Engineers, acting under the instructions of the Secretary of War, to the Monongahela Navigation Company for information whether the company would "undertake, in good faith, the building of lock and dam No. 7," and would give assurance of their ability and purpose to complete the same, to the satisfaction of the Secretary of War, the Board of Directors on the 6th of April, 1881, passed a resolution pledging the Company to undertake the work, and ordered a copy of the same to be transmitted to the Secretary of War, through Major Merrill, accompanied by printed reports, showing its ability to complete the work. These assurances and evidences of ability to complete the work being satisfactory to the Secretary of War, the appropriation of $25,000 was expended in the improvement of the river in West Virginia (not Pennsylvania), and the Company kept its promise and built lock and dam No. 7, completing the navigation to the State line; and although built at the request of the United States, when it was neither the duty nor interest of the Company to build it at that time, it is now proposed to begin the work of dismembering the Company, by appropriating it to public use, and offering the Company the alternative of the acceptance of a sum at least $6,000 less than the actual cost of construction of the lock, dam, appendages and appurtenances, damages paid, etc., or being visited with condemnation proceedings in the United States Court.

But although this lock and dam were constructed under the implied guaranty of the Government of the United States, it is not claimed that any exemption pertains

to it, as respects the power of the Government to take it. No man believes that the Davis Island Dam would have been built if it had not been that the locks and dams of the Navigation Company were in existence on the Monongahela river, and in very beneficial operation as respects the interests of commerce; nor that the Government dam at Morgantown, and the partially built dam between the Morgantown dam and dam No. 7 would have been constructed but for the purpose of allowing the commerce of West Virginia to reach the works of the Navigation Company. No coal could have reached the Davis Island dam without the Navigation Company's works, for none could have been loaded in boats without the water which the dams furnish, and none could have been floated into the Davis Island Dam out of the Monongahela river, except on floods. No commerce could have reached the Ohio river except in the smallest of flat boats, and none could have been carried up stream to the dam, except by the most primitive methods.

We have endeavored to demonstrate, in a memorial which was before the Committee on Rivers and Harbors, that the interests of commerce, as respects the Monongahela river, would not be promoted by freeing the navigation from tolls. Coal is the principal article of commerce which passes over the works of the Monongahela Navigation Company, for transportation beyond Pittsburgh by water. Except from the Chamber of Commerce, at Pittsburgh, when its President was a coal operator, the Board of Trade at Louisville, in a very brief memorial giving no facts nor reasons, and a recommendation of the Commission for the Improvement of the Ohio River, no voice has come from any quarter, from Morgantown, West Virginia, to New Orleans, in so far as we have heard, asking that the Monongahela river should be freed from tolls, saving only, also, the coal operators on these works. Members of Congress from the Mississippi and Ohio rivers may naturally enough conclude that the interests of their constituents, and of the

general public in those regions would be promoted by the proposed legislation. They are interested as members of a large community in obtaining coal at a fair and low price. Will this bill help them? The Committee on Rivers and Harbors will recollect the evidence before them, that there were about seventy-one coal mines on the works of the Navigation Company, but what they perhaps do not know is that nine coal operators and their firms own much the larger number of these mines, and now control, or are endeavoring to secure the control of every ton of coal that is to pass over the works into the Ohio river to be transported beyond Pittsburgh.

PITTSBURGH AND SOUTHERN COAL CO.

These gentlemen own every share of stock in the Pittsburgh and Southern Coal Company, a corporation created by the State of West Virginia, on the 4th day of November, 1886, about the time when the engineers of the U. S. Army, appointed by the Secretary of War, were inquiring into the value and commercial importance of the works of the Navigation Company. The purpose of the corporation, as stated in the certificate of incorporation, is that of "*buying and selling coal.*"

These incorporators and shareholders, popularly termed at Pittsburgh the "Big Nine," are well known at Pittsburgh, (except Mr. Marmet, who is of Cincinnati,) as men of wealth and representing a capital far in excess of the whole value of the works, franchises and property of the Monongahela Navigation Company. It is true that the capital of the company is but $10,000, with the privilege of increasing it to $100,000, but companies of this kind, dealing in sugar, coffee, etc., require no large capital, being merely combinations of existing interests to operate in one direction. The object they aim at is to destroy competition, which they regard as their great enemy, by concert of action, and these nine concerns pay more than *two-thirds* of all tolls collected from any and every source.

The chartered combination is, in modern phraseology, called a "Trust," and the effect, in dealing in coal, would be precisely the same as dealing in sugar, coffee or other necessary or comfort of life.

As these incorporators and their partnerships own nearly all the coal mines on the Monongahela river, and as the purpose of the corporation is to buy and sell coal, it must be manifest that all the coal transported beyond Pittsburgh by water, from the Monongahela valley, will pass under their control. If any person believes that the taking of the works of the Navigation Company for a free public use will result in the reduction of the price of the coal of the Monongahela valley, (regarded as the best in quality, and therefore freer from competition than coals of lower grade,) transported west and south by the Ohio and Mississippi rivers, he has more confidence in the fairness and disinterestedness of corporations of this kind than present public opinion would seem to warrant.

It need only be added that the Pittsburgh and Southern Coal Company, represented by two of its members and the counsel of the company, appeared before the Committee of Rivers and Harbors on the 5th of March last, when the committee was considering the original bill referred to; and the counsel for the Navigation Company, present to represent it at the hearing, then and there heard the suggestion enforced by eloquent advocacy, that the franchises of the Monongahela Navigation Company were not such property as the United States would consider, in making compensation for the works of the company, whether acquired by purchase or in the exercise of the right of eminent domain; but they had no opportunity of replying to the argument, if argument it may be called, of the last speech.

PROTEST AGAINST DISMEMBERMENT OF THE WORKS.

Before proceeding to notice the argument of the learned counsel for the Pittsburgh and Southern Coal Com-

pany, who represented the only interest between Morgantown and New Orleans that was represented at all before the committee, we must protest against the dismemberment of the works of the company by taking them piecemeal. If the Monongahela Navigation Company is to be doomed to certain death, let not the execution of that sentence be by severing its several members, at long intervals, thus needlessly prolonging the agony of dissolution. Already has the stock of the company been greatly depreciated by the efforts of the Pittsburgh and Southern Coal Company to induce the United States to take the company's works. This injury is without reparation. If your Honorable body, after due consideration, should come to the conclusion that this completed navigation, open to everybody, and admitted to have been so beneficial to commerce, should be taken by the United States in the interest of the same commerce, while there are five thousand miles of unimproved rivers, chiefly in the south and west, the improvement of which would greatly develop the resources of many States and to the same extent increase inter-State commerce, or for the improvement of which separately only a few thousand dollars can be obtained, which practically may do no good at all, the Navigation Company must submit, whether satisfied or not; but it protests against dismemberment. If Congress should think that the works ought to be under the control of the United States, the Government is able to pay for them. If we cannot agree as to the price, the United States Court can settle the question of price. The Company does not wish to sell its works; it believes that there is no necessity for taking them; that except the Pittsburgh and Southern Coal Company, few have any interest that they should be so taken; that the so-called argument that the taking would reduce the price of coal on the rivers below Pittsburgh is a mere pretense on the part of those who make it; is a mere delusion in those who are mislead by it, and that nobody will be really benefitted by such taking but the

Pittsburgh and Southern Coal Company. The Company will not, in any event, sell the works and franchises to the United States for a sum less than the actual value to the stockholders.

If it estimates them too high, the Government's own tribunal will ascertain the real value; but the dismemberment of the works would inflict an injury for which no adequate reparation could be obtained.

ARE THE FRANCHISES PROPERTY?—A JUDICIAL QUESTION.

Second. The proviso, which excludes the value of the franchises, "in estimating the sum to be paid by the United States," is so extraordinary in its terms that it would be disrespectful to Congress to suppose that it could be passed by that body without due consideration, for it embodies a question which we think is wholly *judicial*, and proposes to determine it simply by excluding the franchises from the property, the value of which is to be found in a judicial proceeding. Congress may authorize the taking of private property for a public use within the constitutional grants of power by calling into exercise the power of eminent domain, subject only to the limitation of the fifth amendment: "Nor shall private property be taken for public use without just compensation." The National Legislature may, and, indeed must, provide a tribunal for ascertaining that just compensation, but itself cannot be that tribunal. Nor are the terms "just compensation" and "value," when used in reference to the exercise of the power of eminent domain, convertible terms. The former includes the latter, and also includes the damages caused by the taking and privation. It means, both in the popular and legal sense, full amends, "to be made whole," to receive such a sum of money as will place the party whose property is taken, in as good a position *after* the taking as he was in at the time of the taking, and of course includes all damages caused by the

taking, which may be, indeed, the larger element in the just compensation secured by the fifth amendment, while the *value* of the property for the purpose for which it may be taken is ordinarily immaterial.

Now, the State of Pennsylvania, over fifty years ago, incorporated the Monongahela Navigation Company to make a slackwater improvement on the Monongahela river in that State, granting to the Company the franchise of taking tolls on vessels and freight passing over the pools of the improvement when made—the only inducement to the enterprise. There had not been then, and there has not been yet, any action of Congress declaring this stream to be a public highway for commerce, foreign or inter-State. It was unnavigable except on floods, and only down stream. The Company constructed the works which the State required.—seven (7) dams and eleven (11) locks, and developed "an immense commerce" in coal. If the United States have ever constructed works so beneficial to commerce on any river so far inland, where are they? The improvement contravened no law or regulation of the United States.

The power of the States to improve or create navigation on waters within their borders and to authorize the collection of tolls for the use of the artificial facilities provided, has been often and fully vindicated by the Supreme Court of the United States. Escanaba Co. vs. Chicago, 107 U. S. R., 678; Huse vs. Glover, 119 U. S. R. (decided January, 1887), and affirmed by Sands vs. The Manistee River Improvement Company, 123 U. S. R., 288 (decided November 14, 1887), and the numerous cases referred to in the above opinions. It is under this power of the States to make or improve highways on land and water that all the canal and navigation corporations in the United States have built or constructed their works—that the hundreds of bridge companies have built and maintained their structures. All have the franchise of taking tolls, the *quid pro quo*, the compensation for, the inducement to, constructing and maintaining the

works, structures and improvements. Some of these are on and over navigable rivers; some on and over small creeks on which there never was any navigation, and some on land. Indeed, except the great lakes and large rivers, nearly all the channels of commerce in the States, and *inter-State*, owe their existence to the exercise of the power so often upheld by the Supreme Court of the United States, and the States have done much more to develop inter-State commerce than the United States. Some of these improvements and commercial facilities have been made by the States themselves directly; by far the greater part through the instrumentality of corporations created by the respective States. All have a lawful existence; all are public highways, and in case of forfeiture of charter become the property of the State. The valuable property in all is the franchise to take tolls, which the corporation holds; for without this power no revenue could come into the treasury of the corporation. It is perfectly safe to assert that none of these various corporations would ever have existed if any Court of the United States or any respectable legal authority had held that these franchises were not property and entitled to protection as such, both in the Courts of the States and of the United States, or even intimated doubts to that effect. But Congress, calling into exercise the power to regulate commerce, both foreign and inter-State, may interpose and take any of these private properties. It may take the material structures, whether on land or water, but only by the exercise of the power of eminent domain. A power which has remained dormant for ninety-nine years, as respects the Monongahela river may be now awakened into activity. But Congress does not find the Monongahela in its natural state or as it was fifty years ago. A navigation, entirely artificial and very beneficial in promoting inter-State commerce, has been created and is maintained on that river under power of the State of Pennsylvania to develop her own commerce. The works, structures, dams and locks may be taken all the same.

But how taken? Not merely by an act or declaration of Congress that the river is a highway and must be freed from toll and charges, but by exercising the power of eminent domain and making just compensation to the owners. What is just compensation here? By making good to the Navigation Company just what it loses by the interposition of the United States. That loss is not made good—the Company will not be compensated by being paid what the locks and dams may be worth now, or a sum of money which might be sufficient to replace them. The payment of such a sum may be partial compensation, but is not the full amends—the just compensation which the Constitution of the United States provides. No man will maintain that these works would ever have been constructed by the Company if the measure of damages were to be the existing value of the structures when Congress might think proper to interpose. The United States may take by eminent domain, any railroad in the country in the exercise of the power to regulate commerce, and Congress is the exclusive judge of the *necessity* of such taking, but it will hardly be contended that the franchises of the Company should be disregarded in "estimating" "the just compensation" to be made. That cannot be just compensation which is not full compensation But is there a distinction between taking works and improvements on land and on water? In what does it consist? Is it because a navigable river is naturally a highway, and that Congress may interpose in some other way than by the power of eminent domain to remove a dam which obstructs navigation on the water, or a bridge which equally obstructs it from above? If this be so, Wilson vs. The Black Bird Creek Marsh Co., 2 Peters, 245, decided in 1829, was wrongly decided. The tide ebbed and flowed in this creek, and it was navigable by sea-going vessels. The Legislature of Delaware authorized a corporation to construct a close dam without locks across the stream. The Supreme Court of the United States held it to be a lawful

structure, under the laws of Delaware, though it did interrupt navigation. Gilman vs. Philadelphia, 3 Wallace, 713, was the case of a bridge built by the City of Philadelphia across the Schuylkill river, only thirty feet high. The tide rises in the river, so that vessels of from eighteen to twenty feet draught could go up the river above the site of the bridge. The plaintiff owned valuable coal wharves above Chestnut street, but was shut off from access to them by the bridge which was built under the authority of the State of Pennsylvania, and he sustained heavy damages; but the Supreme Court said he was without remedy, because Congress had not interposed and made the river a highway. This case was decided in 1865. Escanaba Co. vs. Chicago, above quoted, decided in 1877, is to the same effect, and affirms the legality of the bridges over the Chicago river in the City of Chicago; and Huse vs. Glover, decided in 1887, holds the same doctrine in reference to the dams in the Illinois river. Have all of these cases and many more been erroneously determined by the highest Court in the land?

There is an impression extensively prevalent among even intelligent people who have not informed themselves on the subject, that Congress, at some time in the past, by a declaratory act, gave public notice that certain large rivers and their *tributaries* were highways for commerce, and were so declared to be. The inference they draw from the assumed premises is that the States and corporations created by the States had notice before they entered upon the improvement of the navigation of the tributaries, whether rivers or creeks, that the general Government might at any time interpose and supersede the State authority and take or destroy the improvements without compensation to the owners of the property. No such act was ever passed by Congress. The 4th section of the Ordinance of 1787, two years older than the Constitution, did declare that "the navigable waters leading into the Mississippi and the carrying places between the same shall be common high-

ways, and forever free * * * without any tax, impost or duty therefor." But this applied only to the territory northwest of the Ohio river, and has no binding effect on the States erected on that territory. Escanaba Co. vs. Chicago; Huse vs. Glover, &c., above quoted. It applied too to the rivers and waters, including the carrying places *only* in their natural State, as shown by the cases referred to above. It never did apply to the states then existing. All property in the United States is held subject to the power of eminent domain, and may be taken by the exercise of that power, for a Constitutional purpose, on making just compensation, and there can be no difference whether the property be on land or on water, or whether the rights of property be exercised on land or water. No property in the whole land can be taken otherwise; and such appears to have been the view and uniform practice of Congress in the cases in which it has exerted its power, in widely separated localities, many instances of which being extracts from the Statutes at Large, are hereto appended. (Appendix.)

(See the opinion of Hon. Wm. Strong, late a Justice of the Supreme Court of the United States, herewith submitted, in which it is demonstrated that the franchises of such a corporation are property.) It may have been unnecessary to say so much; it would certainly be superfluous to say more on this subject, in view of this opinion. The proviso is unconstitutional, and we respectfully submit that it should be stricken out.

Very respectfully,

M. K. MOORHEAD, *President.*

R. B. CARNAHAN,

GEORGE SHIRAS, JR.

Attorneys for Monongahela Navigation Company.

APPENDIX.

EXTRACTS FROM U. S. STATUTES AT LARGE.

That the Secretary of War be, and he is hereby directed to ascertain and report to the next Congress upon what terms the franchise and property of the Little Kanawha Navigation Company in West Virginia can be obtained and conveyed to the United States.

River and Harbor Bill, passed August 2d, 1882.

Statutes at Large, Vol. 22, page 209.

Improving Ship Canal in Galveston Bay, &c., * * provided that no part of said money shall be so expended until the Secretary of War shall be satisfied that the Buffalo Bayou Ship Canal Company has relinquished or abandoned to the United States forever all their franchises and any and all right to collect or impose tolls or charges from any part of said ship channel on Buffalo Bayou.

Statutes at large, Vol. 23, page 135.

Improving Monongahela River, West Virginia and Pennsylvania, twenty-five thousand dollars; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam No. 7, at Jacobs Creek, and until said Company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same. Twenty-first Statutes at Large, 471, approved March 3d, 1881.

Improving Shenandoah River, West Virginia, $2,500. But this sum shall not be expended, nor shall the sum heretofore appropriated therefor be expended until any corporate rights or franchises that may exist over said river shall have been relinquished to the United States to the satisfaction of the Secretary of War. Same reference.

Improvement of the Muskingum River between Zanes-

ville and mouth of the river, and operating the same, $20,000. And the United States hereby accepts from the State of Ohio the said Muskingum river improvement and all the locks, dams and their appurtenances and the canals belonging to said improvement, and all the franchises and property of every kind, and rights in said river and its improvements now owned, held and enjoyed by the State of Ohio, &c., &c. Statutes at Large, Vol. 24, page 324.

An Act for the Improvement of Water Communication between the Mississippi River and Lake Michigan, by the Wisconsin and Fox Rivers, approved July 7th. 1870.

SEC. 2. That the secretary aforesaid is hereby authorized to ascertain, &c., the sum which ought in justice to be paid to the Green Bay and Mississippi Canal Company, a corporation existing under the laws of Wisconsin, as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid and the mouth of the Fox river, including its locks, dams, canals and *franchises, &c.*

SEC. 3. That no money shall be expended on the improvement of the Fox or Wisconsin rivers until the Green Bay and Mississippi Canal Company shall make and file with the Secretary of War an agreement in writing whereby it shall agree to grant and convey to the United States the property and franchises mentioned in the foregoing section, &c.

Statutes at Large, 16th vol., pages 189-90.

Harbor of Refuge, at entrance of Sturgeon Bay Canal, Wisconsin, continuing improvement, $10,000; *provided*, that said sum shall not be expended until any private or corporate right which may exist to impose charges for the use of said harbor shall have been relinquished in a manner satisfactory to the Secretary of War.